A **DEVI MEYYAMMAI M RAMANATHAN & ANOR**

v.

HARTINI MOHAMAD & ANOR

B COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
AZAHAR MOHAMED JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: B-02(IM)-708-2011]
C 25 FEBRUARY 2013

LAND LAW: *Caveat - Private caveat - Extension of - Execution of sale and purchase agreement ('agreement') - Property subject to restriction in interest - Vendor rescinded agreement - Claim for specific performance -* D *Property sold to second defendant - Whether second respondent a bona fide purchaser protected under s. 340 National Land Code - Whether appellants had caveatable interest in property - Whether consent from State Authority to transfer property obtained - Whether appellants performed their contractual obligations - Whether claim was frivolous or* E *vexatious and disclosed a serious question that merits a trial - Whether caveat should be extended until disposal of main action*

The appellants, as purchasers, had entered into a sale and purchase agreement ('SPA') with the first respondent in respect of F the purchase of a property ('the property') which was, at the material time, charged to Affin Bank Bhd ('the bank'). Since the property was subject to a restriction in interest and by virtue of cl. 1.2 of the SPA, the sale and purchase of the property was conditional upon the first respondent to obtain prior consent from G the State Authority to transfer the property to the appellants. On the execution of the SPA and with the first respondent's consent, the appellants forwarded a total sum of RM50,000 to the bank. Approximately one week after the execution of the SPA, the first respondent's solicitors gave notice to the appellants of their client's intention to rescind the SPA. The appellants then lodged H a private caveat on the property and *vide* letter dated 15 October 2010, the appellants gave notice to the first respondent, *inter alia*, that the appellants intended to proceed with the completion of the sale and purchase and of their intention to seek the remedy of specific performance in the event the first respondent did not I proceed with the transaction. The appellants then received the

Form 19C of the National Land Code ('NLC') which gave them notice that the first respondent had applied for the removal of the appellants' caveat. In light of this, the appellants proceeded to file a suit in the High Court against the first respondent for, *inter alia*, specific performance of the SPA and had also applied for an extension of the said caveat pending disposal of the suit filed by them. In dismissing the appellants' application, the learned High Court judge ruled that (i) there was no evidence to show that the State Authority had given its consent; and (ii) the appellants had no caveatable interest in the property. Hence, this appeal. The appellants contended that shortly after the dismissal of their application, the first respondent had sold the property to the second respondent and upon obtaining the State Authority's consent to transfer, the second respondent became the registered owner of the property. The second respondent, who was brought in as a party in this appeal, claimed himself to be a *bona fide* purchaser who was protected under s. 340 of the NLC. Among the issues that arose for consideration were (i) whether the appellants had a caveatable interest in the property; (ii) whether the appellants had shown that their claim was not frivolous or vexatious and disclosed a serious question that merits a trial; and (iii) whether on the balance of convenience, the caveat should be extended until disposal of the main action.

Held (allowing appeal; setting aside order of the High Court)
Per Aziah Ali JCA delivering the judgment of the court:

(1) An application to lodge a private caveat must contain an assertion by the purchaser that there is a concluded contract for the sale and purchase of the land because there can be no claim to the title to the registered land until and unless a purchaser has an enforceable contract for such sale. The fact that there was a concluded contract between the appellants and the first respondent was not an issue. It was also not disputed that the appellants had performed their contractual obligations by tendering monies to the bank which amounted to part performance of the SPA. (paras 13 & 14)

(2) The obligation undertaken by the first respondent under the SPA to apply for consent is a promise *de futuro* to complete the transaction and to enable the appellants to become the registered owners of the property. However, the first respondent had rescinded the SPA approximately one week

A after its execution and it was apparent that by doing so, the first respondent had no intention of carrying out her obligation under cl. 1.2 of the SPA to apply for consent from the State Authority. Due to this, the appellants had been denied the opportunity to assist the first respondent in obtaining such
B consent. (paras 12 & 19)

(3) Notwithstanding the existence of the restriction in interest, it was found that as at the date of entry of the caveat, the appellants had obtained an interest of a contractual nature in
C the property, *ie*, a caveatable interest. Hence, the appellants had shown that they had a *prima facie* contractual right of action against the first respondent which was sufficient to support the caveat. (para 18)

D **(4)** The onus is upon the caveator to satisfy the court that on the evidence presented, his claim to an interest in the property does raise a serious question to be tried, and having done so, he must go on to show that on the balance of convenience, it would be better to maintain the *status quo* until the trial of
E the action by preventing the caveatee from disposing of his land to some third party. At this stage of the proceedings, what is required of the appellants is to show that they had a *prima facie* case and not that they must ultimately succeed. (para 19)

F **(5)** The courts have consistently recognised and given precedence to equitable rights which are prior in time and are not severed by a *bona fide* purchaser for value without notice. Where there is a dispute between the immediate parties to a sale and purchase transaction, a *bona fide* purchaser is not necessarily
G the one who has paid the full purchase price. (para 19)

(6) The onus was on the second respondent, whose title was subsequent to the contract between the first respondent and the appellants, to prove that he was a *bona fide* purchaser for
H value without notice. However, at this stage, it was premature to determine whether the rights of the appellants arising from their contractual agreement with the first respondent ought to prevail over the subsequent dealing between the respondents. In the circumstances, the court was satisfied that the
I appellants' claim was not frivolous and vexatious and that there were serious questions to be tried. (para 19)

(7) Notwithstanding the subsequent purchase by the second respondent and his registration as the owner of the property, the balance of convenience merits that the caveat be allowed to remain to prevent further dealing in the property pending determination of the dispute between the parties. On the factual matrix of this case, the court was of the view that the learned High Court judge ought to have exercised her discretion and allow the appellants' application to extend the caveat. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu, sebagai pembeli, telah memasuki satu perjanjian jual beli ('PJB') dengan responden pertama berkenaan pembelian satu hartanah ('hartanah itu') di mana pada masa material, digadai kepada Affin Bank Bhd ('bank Affin'). Memandangkan hartanah itu mempunyai sekatan kepentingan dan menurut kl. 1.2 PJB, jual beli hartanah itu adalah tertakluk atas kebenaran terdahulu Pihak Berkuasa Negeri yang perlu diperolehi oleh responden pertama bagi pindahmilik hartanah itu kepada perayu-perayu. Setelah PJB dimeretaikan dan dengan kebenaran responden pertama, perayu-perayu telah memajukan jumlah sebanyak RM50,000 kepada bank Affin. Kira-kira seminggu selepas PJB dimeterai, peguamcara responden pertama telah memberi notis kepada perayu-perayu berkenaan niat anakguamnya untuk membatalkan PJB. Perayu-perayu kemudiannya telah memasukkan kaveat atas hartanah itu dan melalui surat bertarikh 15 Oktober 2010, perayu-perayu telah memberi notis kepada responden pertama, antara lain, bahawa perayu-perayu mempunyai niat untuk meneruskan dengan penghabisan jual beli dan niat mereka untuk mendapatkan remedi pelaksanaan spesifik jika responden pertama tidak meneruskan dengan transaksi itu. Perayu-perayu kemudiannya telah menerima Borang 19C Kanun Tanah Negara ('KTN') yang telah memberi notis kepada mereka bahawa responden pertama telah memohon untuk pembatalan kaveat. Berkenaan ini, perayu-perayu telah memfailkan tuntutan di Mahkamah Tinggi terhadap responden pertama bagi, antara lain, pelaksanaan spesifik PJB dan juga telah memohon bagi pelanjutan masa kaveat sehingga penyelesaian tindakan yang difailkan oleh mereka. Dalam menolak permohonan pihak perayu, yang arif hakim Mahkamah Tinggi telah memutuskan bahawa (i) tiada keterangan yang menunjukkan bahawa Pihak Berkuasa Negeri telah memberi kebenarannya; dan (ii) perayu-

perayu tidak mempunyai kepentingan yang boleh dikaveat atas hartanah itu. Oleh itu, rayuan ini. Perayu-perayu berhujah bahawa dalam jangka masa pendek selepas penolakan permohonan mereka, responden pertama telah menjual hartanah itu kepada responden kedua dan setelah memperolehi kebenaran Pihak Berkuasa Negeri, responden kedua telah menjadi pemilik berdaftar hartanah itu. Responden kedua, yang telah dibawa sebagai seorang pihak dalam rayuan ini, telah menuntut dirinya sebagai pembeli *bona fide* yang dilindungi di bawah s. 340 KTN. Di antara isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada perayu-perayu mempunyai kepentingan yang boleh dikaveat atas hartanah itu; (ii) sama ada perayu-perayu telah menunjukkan bahawa tuntutan mereka bukanlah remeh atau menyusahkan dan mendedahkan satu persoalan yang serius untuk dibicarakan; dan (iii) sama ada atas imbangan keselesaan, kaveat sepatutnya dilanjutkan sehingga penyelesaian tindakan utama.

Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)

Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Suatu tuntutan untuk memasukkan kaveat persendirian mestilah mengandungi pengakuan oleh pembeli bahawa terdapatnya satu kontrak yang telah disimpulkan bagi jual beli tanah itu kerana tidak boleh adanya tuntutan terhadap hakmilik tanah berdaftar sehingga pembeli mempunyai suatu kontrak yang boleh dikuatkuasakan bagi jualan sebegitu. Fakta bahawa terdapatnya satu kontrak yang telah disimpulkan di antara perayu-perayu dan responden pertama bukanlah satu isu. Ianya juga tidak dipertikaikan bahawa perayu-perayu telah melaksanakan obligasi kontraktual mereka dengan memberi wang kepada bank Affin yang berjumlah kepada pelaksanaan sebahagian PJB.

(2) Obligasi yang dilaksanakan oleh responden pertama di bawah PJB bagi memohon kebenaran adalah suatu perjanjian *de futuro* untuk menyelesaikan transaksi itu dan membolehkan perayu-perayu menjadi pemilik berdaftar hartanah itu. Walau bagaimanapun, responden pertama telah membatalkan PJB kira-kira seminggu selepas ianya dimeteraikan dan dengan berbuat sedemikian, responden pertama tidak mempunyai niat untuk melaksanakan obligasinya di bawah kl. 1.2 PJB bagi memohon untuk kebenaran Pihak Berkuasa Negeri. Oleh itu, perayu-perayu telah dinafikan peluang untuk menolong responden pertama dalam mendapatkan kebenaran sebegitu.

(3) Walaupun wujudnya sekatan kepentingan, ianya didapati bahawa pada tarikh kemasukan kaveat, perayu-perayu telah memperolehi kepentingan bersifat kontrak di dalam hartanah itu, iaitu, kepentingan yang boleh dikaveat. Dengan itu, perayu-perayu telah menunjukkan bahawa mereka mempunyai tindakan hak kontraktual *prima facie* terhadap responden pertama yang boleh menyokong kaveat tersebut.

(4) Beban adalah atas pengkaveat untuk memuaskan mahkamah bahawa atas keterangan yang dikemukakan, tuntutan beliau bagi kepentingan atas hartanah membangkitkan satu persoalan serius untuk dibicarakan, dan dengan berbuat sedemikian, beliau mesti menunjukkan bahawa atas imbangan keselesaan, ianya adalah lebih sesuai untuk mengekalkan *status quo* sehingga perbicaraan tindakan dengan menghalang penanggung kaveat daripada melupuskan hartanahnya kepada pihak ketiga. Pada tahap prosiding ini, pihak perayu hanya perlu menunjukkan bahawa mereka mempunyai satu kes *prima facie* dan bukannya mereka mesti berjaya pada akhirnya.

(5) Mahkamah selalunya mengikhtiraf dan memberi duluan kepada hak ekuiti terdahulu dan tidak boleh dipisahkan oleh seorang pembeli *bona fide* untuk nilai tanpa notis. Di mana adanya pertikaian di antara pihak-pihak terhadap transaksi jual beli, seorang pembeli *bona fide* tidak semestinya adalah orang yang telah membayar harga belian sepenuhnya.

(6) Beban adalah atas responden kedua, di mana hakmiliknya adalah selepas kontrak di antara responden pertama dan perayu-perayu, untuk membuktikan bahawa beliau adalah pembeli *bona fide* untuk nilai tanpa notis. Walau bagaimanapun, pada tahap ini, ianya adalah pramasa untuk menentukan sama ada hak pihak perayu berbangkit daripada perjanjian kontraktual mereka dengan responden pertama sepatutnya diatasi dengan urusan seterusnya di antara responden-responden. Di dalam keadaan ini, mahkamah berpuas hati bahawa tuntutan perayu bukanlah remeh atau menyusahkan dan mendedahkan satu persoalan yang serius untuk dibicarakan.

(7) Tanpa mengambilkira belian seterusnya oleh responden kedua dan pendaftaran beliau sebagai pemilik hartanah itu, imbangan keselesaan memerlukan bahawa kaveat dibenarkan untuk dikekalkan bagi mengelakkan urusan lanjut sehingga pertikaian

A di antara pihak-pihak ditentukan. Berdasarkan fakta kes, mahkamah berpandangan bahawa yang arif hakim Mahkamah Tinggi sepatutnya melaksanakan budi bicaranya dan membenarkan permohonan pihak perayu untuk melanjutkan kaveat.

B

Case(s) referred to:

Bachan Singh v. Mahinder Kaur & Ors [1956] 1 LNS 14 HC ***(refd)***
Chin Cheng Hong v. Hameed & Ors [1954] 1 LNS 7 HC ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***
Goo Hee Sing v. Will Raja Perumal & Anor [1994] 1 CLJ 255 HC ***(dist)***

C *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC* ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(refd)***

D *Mahadevan & Anor v. Patel [1975] 1 LNS 95 FC* ***(refd)***
Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(refd)***

E *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC* ***(refd)***
Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(refd)***
Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***

F *Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC* ***(refd)***

Legislation referred to:

National Land Code, ss. 323(1)(a), (b), (c), 326(1B), 340

G *For the appellant - T Gunaseelan; M/s Gunaseelan & Assocs*
For the 1st respondent - Moses Susayan; M/s Raja Badrol, Ramli & Azizi
For the 2nd respondent - Sri Dev Nair; M/s Sri Dev & Naila

[Appeal from High Court, Shah Alam; Suit No: 22-1549-2010]

H *Reported by Kumitha Abd Majid*

I

JUDGMENT

Aziah Ali JCA:

[1] This is an appeal against the decision of the learned judge of the Shah Alam High Court dismissing the application made by the appellants under s. 326(1B) of the National Land Code ("NLC") *vide* summons in chambers (encl. 3) for an order that the private caveat lodged by the appellants on property known as HS(D) 13449, PT3, Seksyen 14, Bandar Petaling Jaya, Daerah Petaling, Selangor ("the property") be extended pending the determination of the suit for specific performance filed by the appellants against the 1st respondent. The said property is subject to a restriction in interest which reads as follows:

> Tanah yang diberi milik ini tidak boleh dipindah milik, dipajak atau digadai melainkan dengan kebenaran Pihak Berkuasa Negeri.

[2] The learned High Court Judge found that there is no evidence to show that the State Authority had given its consent. Following the decision of Mahadev Shankar J (as he then was) in the case of *Goo Hee Sing v. Will Raja Perumal & Anor* [1994] 1 CLJ 255, the learned judge held that the appellants have no caveatable interest in the property and on that ground dismissed the appellant's application.

[3] The appellants, being dissatisfied with the decision of the learned judge, appealed to this court. We heard the appellants' appeal and allowed the appeal and set aside the order of the High Court thus restoring the appellants' caveat pending determination of their suit against the 1st respondent.

[4] The salient background facts are as follows. The 1st respondent was the registered owner of the property. The appellants as purchasers had entered into a sale and purchase agreement dated 8 October 2010 ("SPA") with the 1st respondent in respect of the property at the purchase price of RM200,000. At the material time the property was charged to Affin Bank Bhd ("Affin"). Clause 2.1.1 provides that RM20,000 being the deposit was to be paid upon execution of the SPA whilst cl. 2.1.2 provides that the deposit together with an additional RM20,000 being part payment of the purchase price are to be paid to Affin. On the execution of the SPA and with the 1st respondent's consent, the appellants forwarded a total sum of RM50,000 to Affin.

[5] Clause 1.2 of the SPA provides that the sale and purchase of the property is conditional upon the 1st respondent, at her own cost and expense, obtaining prior consent of the State Authority to transfer the property to the appellants. Clause 1.3 provides that immediately upon execution of the SPA, both the 1st respondent and the appellants shall take all necessary steps to apply for consent and to do all things and acts as may be necessary or required to obtain the same. The consent was to be obtained within six months from the date of the SPA and in the event such consent was not obtained within the said period, the parties may in writing agree to extend the period. Clause 2.1.3 provides that the balance purchase price of RM160,000 is to be paid within 90 days from the completion date ie, the date on which the appellants' solicitors receive the consent of the State Authority (cl. 1.5). The SPA also provides that if despite efforts made by the parties such consent was still not obtained then the SPA shall terminate and the RM40,000 shall be refunded to the appellants.

[6] Approximately one week after the execution of the SPA, by a letter dated 14 October 2010 issued through her solicitors the 1st respondent gave notice to the appellants of her intention to rescind the SPA. The three relevant reasons given for the termination are in essence as follows (pp. 140-141 of the appeal record):

(1) that the 1st respondent intended to rescind the Sale and Purchase Agreement since she has been duly advised by her family members not to proceed with the sale of the property to any third party;

(2) that the 1st respondent was under tremendous pressure and was not in the right frame of mind when she signed the Sale and Purchase Agreement since the property was subject to an auction on 12.10.2010;

(3) that Affin has issued a Debt Work Out Letter dated 13.10.2010 instructing the 1st respondent to sign their offer for settlement of her outstanding loan with them at RM200,000.00 within seven days from the date of the letter failing which the offer shall lapsed and the bank shall pursue to claim the actual outstanding as at 30.9.2010 at RM371,333.22 and she has been informed by the bank that they shall forfeit the sum of RM50,000.00 earlier paid to the bank.

[7] In the same letter the 1st respondent undertook to refund to the appellants the monies which the appellants had paid to Affin and upon the appellants' receipt of the monies neither party shall have any claim against each other in respect of the transaction. On the same date the appellants lodged the private caveat. By letter dated 15 October 2010 the appellants gave notice to the 1st respondent's solicitors amongst others that the appellants intended to proceed with the completion of the sale and purchase and of their intention to seek the remedy of specific performance under cl. 6.2 of the SPA in the event the 1st respondent did not proceed with the transaction. The appellants then received Form 19C dated 3 November 2010 giving notice that the 1st respondent had applied for removal of the appellants' caveat. On 6 December 2010 the appellants filed a suit against the 1st respondent for specific performance of the SPA and/or alternatively for general damages to be assessed and applied to the court *vide* encl. 3 for extension of the said caveat pending disposal of the suit filed by the appellants.

[8] According to the appellants' counsel shortly after the dismissal of the appellants' application, the 1st respondent sold the property to the 2nd respondent who then settled all monies due to Affin and upon obtaining consent to transfer from the State Authority, is now the registered owner of the property. The 2nd respondent was brought in as a party in this appeal *vide* an *ex parte* order of this court dated 15 February 2012. Before us the 2nd respondent opposed this appeal and claims, as *bona fide* purchaser, the protection under s. 340 of the National Land Code ("NLC").

[9] A caveator must first satisfy the court that he has a 'caveatable interest' in the land (*Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441). Under the NLC, whether or not a person or body has any caveatable interest must be determined with reference to s. 323(1)(a), (b) or (c) (*Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802). Section 323(1) provides as follows:

Applications for entry of private caveats

(1) The persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;

A (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

B **[10]** In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 520 Gopal Sri Ram JCA (as he then was) discussed what is meant by caveatable interest as distinguished from other interest in land. His Lordship said *inter alia*:

C

> The parameters of caveatability under s. 323(1)(a) are therefore circumscribed by these words: "title" and "registrable interest". It is only one who makes a claim to either of these in land may enter a private caveat.

D **[11]** In respect of caveatable interest His Lordship said:

> It is our considered view, therefore, that based on the provisions of the NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may
E either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest.
>
> Emphasis should be given to the words "registrable interest" in
F s. 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.

[12] In the present appeal the learned judge followed *Goo Hee*
G *Sing* and dismissed the appellants' application based on the existence of the restriction in interest and the absence of evidence that consent from the State Authority had been applied for. However we note that in *Goo Hee Sing* Mahadev Shankar J raised issues regarding the sale and purchase transaction. In that case
H the plaintiff filed his suit for specific performance on 29 September 1992 which was approximately four years after the deed of sale was executed. However even four years after the execution of the deed there was no evidence before the court that consent had ever been applied for. Shankar J said that the plaintiff should have
I been able to claim title to the said land, or a right to such title by virtue of the deed of sale. Alternatively he should be a person

who could validly claim a right to such title. His Lordship stated that because the applicant was not able to demonstrate that an application for approval had already been made and that the State Authority was bound to grant that approval as a matter of course within a reasonable period of time, he was impelled to the conclusion that a prospective purchaser, charge, or lessee of such land can have no caveatable interest in such land until the consent of the State Authority has first been irrevocably obtained. Consequently His Lordship dismissed the application to maintain the caveat "until the grey areas surrounding the circumstances of the granting or withholding of consent to deal with land subject to such restrictions in interest are clarified". We are of the view that on the facts, this appeal is distinguishable from *Goo Hee Sing*. We find that the learned judge in following *Goo Hee Sing* has not sufficiently considered the factual matrix of this case when Her Ladyship concluded that the appellants herein have no caveatable interest in the property. In her brief grounds of judgment Her Ladyship stated "Di dalam kes ini, tidak ada langsung bukti yang menunjukkan bahawa persetujuan Pihak Berkuasa Negeri telah diperolehi atau dipohon". However the facts in the present appeal show that the 1st respondent had rescinded the SPA approximately one week after its execution. It is apparent that by rescinding the SPA, the 1st respondent had no intention of carrying out her obligation under cl. 1.2 to apply for consent from the State Authority and the appellants had been denied the opportunity to assist her to obtain such consent. Hence in the circumstances production of evidence that consent had been applied for had been rendered impossible.

[13] Any claim of a right to lodge a caveat must be minutely inquired into in order to decide whether the caveat should remain or be removed (*Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150). An application to lodge a private caveat must contain an assertion by the purchaser that there is a concluded contract for the sale and purchase of the land because there can be no claim to the title to registered land until and unless a purchaser has an enforceable contract for such sale. In *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545 the Court of Appeal found that the

respondent had not made any assertion in his application that there was a concluded contract for the purchase and sale of the subject land. Gopal Sri Ram JCA (as he then was) said:

> The grounds that the respondent asserted in his application in order to lay claim to the title to the land are: (1) That he paid an earnest deposit of RM2000; (2) That he had discussions and meetings with Adaikappan on the terms and conditions of the sale and purchase agreement; (3) That Adaikappan had not responded to letters written by the respondent and his solicitor for the preparation of the sale and purchase agreement; and (4) That the caveat is being entered pending the execution of that agreement and the transfer of the property to him.
>
> Now, it is clear that nowhere in the application is there an assertion of a concluded contract for the sale and purchase of the land in question. In the absence of such an assertion it cannot be said that the respondent has a claim to the title to the land.
>
> Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. *A fortiori*, he has no interest that is capable of protection by the entry of a caveat. As we have said, the application for the entry of the caveat in the instant case contains no assertion of a concluded contract.

[14] In the present appeal we find that nowhere in the learned judge's grounds of judgment did Her Ladyship refer to Form 19B. In the appellants' application in Form 19B it is stated that they have the right to lodge the caveat by virtue of the SPA (p. 145 appeal record). The fact that there was a concluded contract between the appellants and the 1st respondent is not in issue. It is also not disputed that the appellants have performed their contractual obligations by tendering monies to Affin which amounted to part performance of the SPA. In *Bachan Singh v. Mahinder Kaur & Ors* [1956] 1 LNS 14 Thomson J said *inter alia* as follows:

> Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code … Nevertheless, the point is that when that contract was made the

purchasers acquired a right *ad rem* and *in personam* to the land which so far as the vendor was concerned they were entitled to have erected into a real right. I am not prepared to say that that amounted to an equitable right. I prefer to regard it as a legal right of the nature of a chose in action.

[15] In *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67 Raja Azlan Shah FJ (as His Highness then was) said:

In my view, *the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally. That is a caveatable interest*. There is statutory support for this view *vide* s. 323(1)(a) of the National Land Code which appears wide enough to include any person claiming any right to title or interest in land. (emphasis added)

[16] Buhagiar J said in *Chin Cheng Hong v. Hameed & Ors* [1954] 1 LNS 7:

This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; *the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat* (in *re Registration of Caveat* [1908] Innes 114). The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse. (emphasis added)

[17] In *Mahadevan & Anor v. Patel* [1975] 1 LNS 95 the late Suffian LP dealt with s. 323(1)(a) of the National Land Code and observed as follows:

... and as the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is *any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest*, who may enter a caveat ... (emphasis added)

[18] Thus notwithstanding the existence of the restriction in interest, after considering the evidence before us and on the authorities cited above, we find that as at the date of entry of the caveat the appellants had obtained an interest of a contractual nature in the property. In other words, they acquired a caveatable

A interest in the property. We are of the considered view that the appellants have shown that they have a *prima facie* contractual right of action against the 1st respondent which is sufficient to support the caveat.

B **[19]** Having found that the appellants' claim as expressed in Form 19B amounts to a caveatable interest, the next question that has to be considered is whether the appellants have shown that on the factual matrix their claim is not frivolous or vexatious and that their claim discloses a serious question that merits a trial. The C onus is upon the caveator to satisfy the court that on the evidence presented his claim to an interest in the property does raise a serious question to be tried, and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by D preventing the caveatee from disposing of his land to some third party (per Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18). At this stage of the proceedings what is required of the appellants is to show that they have a *prima facie* case and not that they must ultimately succeed. We are of the E considered view that the obligation undertaken by the 1st respondent under the SPA to apply for consent is a promise *de futuro* to complete the transaction and to enable the appellants to become the registered owners of the property. However the 1st respondent has rescinded the SPA and shortly after the F dismissal of the appellants' application by the High Court the 1st respondent sold the property to the 2nd respondent who claims that he is a *bona fide* purchaser. Thus there are competing interests in the property between the appellants and the 2nd respondent. We are of the view that the dispute between the G appellants and the 1st respondent, the remedies if any available to the appellants, the rival claims of the appellants and the 2nd respondent in respect of the property all merit further consideration by the court hearing the suit filed by the appellants. It is well settled that the onus is on the 2nd respondent, whose H title was subsequent to the contract between the 1st respondent and the appellants, to prove that he is a *bona fide* purchaser for value without notice. Where there is a dispute between the immediate parties to a sale and purchase transaction, a *bona fide* purchaser is not necessarily one who has paid the full

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purchase price. Much will depend upon the particular circumstances of each case (per Edgar Joseph Jr, FCJ in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793). In *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96 the Federal Court held that the onus of proof was on the persons claiming by a title subsequent to the contract of sale to show that they were *bona fide* purchasers for value without notice of the earlier contracts. It is to be remembered that our courts have consistently recognised and give precedence to equitable rights which are prior in time and are not severed by a *bona fide* purchaser for value without notice (per Abdul Malik Ishak JCA in delivering the majority judgment of the court in *Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712). At this stage we are of the view that it is premature to determine whether the rights of the appellants arising from their contractual agreement with the 1st respondent ought to prevail over the subsequent dealing between the 1st respondent and the 2nd respondent. In the circumstances we are satisfied that the appellant's claim is not frivolous and vexatious and that there are serious questions to be tried.

[20] The next question is whether on the balance of convenience, the caveat should be extended until the disposal of the main action. In our considered opinion notwithstanding the subsequent purchase by the 2nd respondent and his registration as the owner of the property, the balance of convenience merits that the caveat be allowed to remain to prevent further dealing in the property pending determination of the dispute between the parties. On the factual matrix of this case we are of the view that the learned High Court Judge ought to have exercised her discretion and allow the appellants' application to extend the caveat. For the reasons stated above we allowed the appeal with costs of RM10,000 here and below against the 1st respondent and set aside the order of the High Court. No costs was ordered against the 2nd respondent. The deposit was ordered to be refunded.